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Kevin W. Brown

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# HOME RULE WETLANDS PROTECTION IN MASSACHUSETTS: *LOVEQUIST V. CONSERVATION COMMISSION OF THE TOWN OF DENNIS*

*Kevin W. Brown\**

## I. Introduction

Wetlands are low-lying land areas, usually adjacent to bodies of water, where the ground water table approaches the land surface. Wetlands may be classified as such by soil type, plant life, or the high water mark.<sup>1</sup> In common terms, they include swamps, bogs, and salt or freshwater marshes. The ecological significance of wetlands in the United States and throughout the world has only recently been recognized. Wetlands have been shown to play an important role in flood prevention, the maintenance of the ground water table, the filtration of pollution, and the nourishment of fish and wildlife.<sup>2</sup>

The recognition of the value of wetlands has come at a time when, particularly in coastal areas, they are rapidly being destroyed. Population pressures have led to increased dredging and filling of wetlands to provide more space for residential and commercial use. Legislative efforts to halt the overdevelopment of the nation's wetlands have, not surprisingly, raised a myriad of legal questions, some of which will be examined in this article.<sup>3</sup>

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\* Managing Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW

<sup>1</sup> For a discussion of statutory problems in defining wetlands and a general discussion of the New York Freshwater Wetlands Act, see Comment, *The Freshwater Wetlands Act: Permissive Regulation vs. Constructive Taking*, 43 ALB. L. REV. 295 (1979).

<sup>2</sup> See generally J. TEAL & M. TEAL, *THE LIFE AND DEATH OF A SALT MARSH* (1969).

<sup>3</sup> This article does not discuss the often-litigated issue of whether an unconstitutional taking has occurred. See: *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Turnpike*

Concern about wetlands development has led to efforts at all levels of government to curb the rate of wetlands destruction.<sup>4</sup> The federal government possesses considerable jurisdiction in the field due to its broadly interpreted control of navigable waters.<sup>5</sup> It has exercised its authority through several statutes, most notably the Rivers and Harbors Act of 1899,<sup>6</sup> the Federal Water Pollution Control Act of 1972,<sup>7</sup> and the Coastal Zone Management Act.<sup>8</sup> However, the development of wetlands is predominantly a property issue and as such lies within the traditional purview of state police powers. For this reason, responsibility for the regulation of wetlands development has fallen largely to the states.<sup>9</sup> The federal government has encouraged state action particularly through the Coastal Zone Management Act which provides funding to approved state coastal management programs.<sup>10</sup>

Approaches to wetlands protection vary from state to state. Many states leave the issue to local zoning by-laws and ordi-

*Realty Co. v. Town of Dedham*, 362 Mass. 221, 284 N.E.2d 891 (1972), *cert. denied*, 409 U.S. 1108 (1973); *Commissioner of Natural Resources v. S. Volpe & Co.*, 349 Mass. 104, 206 N.E.2d 666 (1965); *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*, 40 N.J. 539, 193 A.2d 232 (1963); *Just v. Marinette County*, 56 Wis.2d 7, 201 N.W.2d 761 (1972); F. BOSSELMAN, D. CALLIES, & J. BANTA, *THE TAKING ISSUE* (1973); Dawson, *Protecting Massachusetts Wetlands*, 12 SUFFOLK L. REV. 755 (1978).

<sup>4</sup> See, e.g., *Just v. Marinette County*, 56 Wisc.2d 7, 201 N.W.2d 761 (1972); *Massachusetts Wetlands Protection Act*, MASS. GEN. LAWS ANN. ch. 131, § 40 (West Supp. 1980); Exec. Order No. 11,990, 3 C.F.R. 121 (1978), *reprinted in* 42 U.S.C.A. § 4321 (West Supp. 1979); G. McGregor & A. Dawson, *Wetlands and Floodplain Protection*, 64 MASS. L. REV. 73 (1979).

<sup>5</sup> See *United States v. Ashland Oil and Transportation Co.*, 504 F.2d 1317 (6th Cir. 1974); *NRDC v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

<sup>6</sup> 33 U.S.C.A. §§ 401-467e (West Supp. 1980). This act regulates construction and dumping in navigable waters. See generally, Myhrum, *Federal Protection of Wetlands through Legal Process*, 7 B.C. ENV. AFF. L. REV. 567, 579-88 (1979).

<sup>7</sup> 33 U.S.C.A. §§ 1251-1376 (West Supp. 1980). Section 404 of the Federal Water Pollution Control Act, 33 U.S.C.A. § 1344 (West 1978) establishes a permit system for the discharge of dredged or fill material into navigable waters. For a copacetic analysis of Section 404, see Myhrum, *Federal Protection of Wetlands through Legal Process*, 7 B.C. ENV. AFF. L. REV. 567 (1979).

<sup>8</sup> 16 U.S.C.A. §§ 1451-1464 (West Supp. 1980). This act funds federally approved state programs which monitor and coordinate coastal development. Hildreth, *The Operation of the Federal Coastal Zone Management Act as Amended*, 10 NAT. RES. L. 211 (1977). Shaffer, *O.C.S. Development and the Consistency Provisions of the Coastal Zone Management Act—A Legal and Policy Analysis*, 4 OHIO NORTH. L. REV. 595 (1977).

<sup>9</sup> Some commentators have expressed concern that federal environmental regulation as interpreted by the courts interferes more than is necessary in areas of traditional state interest. See Comment, *Preemption Doctrine in the Environmental Context: A Unified Method of Analysis*, 127 U. PA. L. REV. 197 (1978).

<sup>10</sup> 16 U.S.C.A. § 1455 (West Supp. 1980).

nances.<sup>11</sup> Several states, including Massachusetts, have enacted comprehensive wetlands protection statutes which regulate the development of wetlands throughout the state.<sup>12</sup> The Massachusetts Wetlands Protection Act<sup>13</sup> prohibits the alteration of wetlands without a permit from a locally appointed conservation commission. Towns and cities in Massachusetts also possess authority to regulate wetlands development through their zoning powers<sup>14</sup> and, to some extent, under the state earth removal statute.<sup>15</sup>

The adoption of home rule by Massachusetts<sup>16</sup> and many other states has raised the intriguing possibility of the use of a new approach to wetlands protection at the local level. This approach involves the use of independent municipal powers, apart from state zoning and wetlands protection systems, to enact local wetlands by-laws and ordinances.<sup>17</sup> The use of home rule powers for environmental protection and other purposes has met with a narrow judicial interpretation in some states.<sup>18</sup> It is in the light of such restrictive views that the recent Massachusetts Supreme Judicial

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<sup>11</sup> For a seminal discussion of the use of zoning for the closely-related purpose of flood control, see Dunham, *Flood Control Via the Police Power*, 107 U. PA. L. REV. 1098 (1959).

<sup>12</sup> See, e.g., CONN. GEN. STAT. ANN. §§ 22a-28 to 22a-45 (West Supp. 1980); DEL. CODE ANN. tit. 7, §§ 6601-6620 (1979); GA. CODE ANN. §§ 43-2401 to 43-2413 (1978); ME. REV. STAT. ANN. tit. 38, §§ 471-478 (Supp. 1980); MD. NAT. RES. CODE ANN. §§ 9-101 to 9-501 (Supp. 1979); MASS. GEN. LAWS ANN. chs. 130 § 105, 131 §§ 40, 40A (West Supp. 1980); N.J. STAT. ANN. §§ 13:9A-1 to 9A-10 (West 1979); N.Y. ENVIR. CONSERV. LAW §§ 24-0101 to 24-0303, 25-0101 to 25-0601 (McKinney Supp. 1979); N.C. GEN. STAT. §§ 113-229 to 113-230 (Supp. 1979); R.I. GEN. LAW. § 11-46.1-1 (Supp. 1980); VA. CODE §§ 62.1-13.1 to 62.1-13.20 (Supp. 1980).

<sup>13</sup> MASS. GEN. LAWS ANN. ch. 131, § 40 (West Supp. 1980).

<sup>14</sup> *Golden v. Board of Selectmen of Falmouth*, 358 Mass. 519, 265 N.E.2d 573 (1970).

<sup>15</sup> MASS. GEN. LAWS ANN. ch. 40, § 21(17) (West Supp. 1980).

<sup>16</sup> MASS. CONST. amend. art. LXXXIX.

<sup>17</sup> See Pierce, *Home Rule and Municipal Environmental Regulation in Kansas*, 26 KAN. L. REV. 535 (1978).

<sup>18</sup> Comment, *State and Municipal Government: Home Rule*, 14 ANN. SURVEY MASS. LAW 264 (1967). But see Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643 (1964), for the proposition that home rule authorizations have not in fact been strictly construed.

A notable example of the narrow construction of home rule may be found in Illinois where the courts have interpreted the Illinois Environmental Protection Act, ILL. ANN. STAT. ch. 111½, §§ 1001-1045 (Smith-Hurd Supp. 1980), *City of Des Plaines v. Chicago & N.W. Ry.*, 65 Ill.2d 1, 357 N.E.2d 433 (1976); *Metropolitan Sanitary District v. City of Des Plaines*, 63 Ill.2d 256, 347 N.E.2d 716 (1976) as pre-empting any home rule environmental protection. This position has been strongly criticized by commentators. See Minetz, *Recent Illinois Supreme Court Decisions Concerning the Authority of Home Rule Units to Control Local Environmental Problems*, 26 DEPAUL L. REV. 306 (1977); Bornstein, *Sanitary Landfill Permits in Illinois: State Preemption of Home Rule Zoning Powers*, 8 LOY. CHI. L.J. 353 (1977).

Court decision in *Lovequist v. Conservation Commission of the Town of Dennis*<sup>19</sup> takes on considerable importance. In that case the court considered the question of a town's ability to enact a wetlands protection by-law under its home rule powers. The court decided that neither the Massachusetts Zoning Enabling Act<sup>20</sup> nor the Wetlands Protection Act preempted the field of wetlands regulation from local home rule enactments. This decision has cleared a new path for municipal regulation of wetlands development in Massachusetts.

This article will explore the power of Massachusetts municipalities to regulate wetlands development in light of the *Lovequist* decision. First, it will examine municipal authority to regulate wetlands through the statutory authorizations of the Wetlands Protection Act, the Zoning Enabling Act, and the state earth removal statute. Second, it will discuss the adoption and judicial interpretation of home rule in Massachusetts. Finally, it will examine the application of home rule principles to wetlands protection in the *Lovequist* case and explore the probable significance of this decision both in Massachusetts and in other states.

## II. STATUTORY AUTHORIZATIONS FOR MUNICIPAL WETLANDS PROTECTION

### A. *The Wetlands Protection Act*

The Massachusetts Wetlands Protection Act was enacted in 1972.<sup>21</sup> It employs a permit system under which no person may "alter" a wetland without a permit from the local conservation commission. Commissions are appointed by the mayor or board of selectmen of each municipality. Members serve three-year terms.<sup>22</sup>

Under the Wetlands Protection Act, any person wishing to fill, dredge, or alter a wetland in Massachusetts must file a notice of intent with the local conservation commission. The commission must hold a public hearing on the proposal within twenty-one days. Following the hearing, the commission is required to determine whether the area in which the work is to be done is "signifi-

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<sup>19</sup> 79 Mass. Adv. Sh. 2210, 393 N.E.2d 858 (1979). For the sake of brevity, this case will be referred to in text and notes as *Lovequist v. Town of Dennis*.

<sup>20</sup> Act of May 3, 1954, ch. 368, 1954 Mass. Acts 244.

<sup>21</sup> Act of July 18, 1972, ch. 784, 1972 Mass. Acts 744 (codified at MASS. GEN. LAWS ANN. ch. 131, § 40 (West Supp. 1980)).

<sup>22</sup> MASS. GEN. LAWS ANN. ch. 40, § 8C (West Supp. 1980).

cant" to any of the following wetlands values: (1) public or private water supply; (2) ground water supply; (3) flood control; (4) storm damage prevention; (5) prevention of pollution; (6) protection of land containing shellfish; and (7) protection of fisheries.<sup>23</sup> If the commission determines, based on evidence presented at the hearing, that the wetland which the applicant proposes to alter is significant to one or more of these interests, it is required to impose, through an "order of conditions," such "conditions"<sup>24</sup> on the proposed alteration as the commission finds necessary to protect the significant wetlands interests involved.<sup>25</sup>

Local conservation commissions have broad discretion in making their findings and imposing conditions. However, a *de novo*<sup>26</sup> appeal from a commission's decision or failure to act is available in the Massachusetts Department of Environmental Quality Engineering (DEQE).<sup>27</sup> Under the *de novo* standard of review, the DEQE may make its own fact determinations as well as applying its own interpretation of the Act to those facts. Because the DEQE review is *de novo*, the state agency has ample authority with which to overrule local decisions. From a municipal point of view this superseding state authority may present a major drawback to reliance on the Wetlands Protection Act for the regulation of local wetlands.<sup>28</sup> Cities and towns which wish to exercise greater local control over wetlands regulation must look to other statutory authorizations.

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<sup>23</sup> MASS. GEN. LAWS ANN. ch. 131, § 40 (West Supp. 1980).

<sup>24</sup> *Id.* The statute does not expressly grant local commissions the power to prohibit development.

<sup>25</sup> *Id.*

<sup>26</sup> "Hearing *de novo*" has been defined as "a new hearing or a hearing for a second time, contemplating an entire trial in the same manner in which . . . [the] . . . matter was originally heard and a review of . . . [the] . . . previous hearing." BLACK'S LAW DICTIONARY 649 (5th ed. 1979). The Wetlands Protection Act does not expressly provide for a *de novo* appeal to the DEQE, but this is the generally accepted interpretation of the statute. DAWSON & MCGREGGOR, ENVIRONMENTAL LAW (1978). The Act provides that, upon appropriate request, "[T]he department shall make the determination" of whether the alteration proposed would significantly affect the wetlands interests listed. MASS. GEN. LAWS ANN. ch. 131, § 40 (West Supp. 1980).

<sup>27</sup> MASS. GEN. LAWS ANN. ch. 131, § 40 (West Supp. 1980).

<sup>28</sup> It is difficult to obtain current statistics on the implementation of the Wetlands Protection Act. In the past, it has been estimated that 10 percent of the Orders of Conditions issued by the local conservation commissions were superseded by DEQE orders. OFFICE OF COASTAL ZONE MANAGEMENT, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE, MASSACHUSETTS COASTAL ZONE MANAGEMENT PROGRAM AND FINAL ENVIRONMENTAL IMPACT STATEMENT 164 (1978).

### B. *The Zoning Act*

A second avenue for wetlands regulation which places more authority in the municipality than does the Wetlands Protection Act is the Massachusetts zoning statute. The present zoning law, entitled the Zoning Act, was enacted in 1975<sup>29</sup> and replaced the Zoning Enabling Act.<sup>30</sup> Both acts set out procedures for municipalities to follow in order to adopt or alter zoning by-laws and ordinances. They also outline purposes for which zoning by-laws and ordinances can be enacted.<sup>31</sup>

The Zoning Enabling Act allowed municipalities to pass zoning by-laws regulating land use "for the purpose of promoting the health, safety, convenience, morals, or welfare"<sup>32</sup> of their residents, and expressly allowed that: "A zoning ordinance or by-law may provide that lands deemed subject to seasonal or periodic flooding shall not be used for residence or other purposes in such a manner as to endanger the health or safety of the occupants' thereof."<sup>33</sup> Numerous wetlands decisions were reached under this statute.<sup>34</sup>

In *Golden v. Board of Selectmen of Falmouth*,<sup>35</sup> the Massachusetts Supreme Judicial Court determined that local regulation of wetlands development was authorized by the Zoning Enabling Act. The court held that the then-existing wetlands statute<sup>36</sup> which regulated the filling and dredging of coastal wetlands was not intended to preclude municipalities from enacting more stringent regulations under their zoning powers. Specifically, under the old state statute a person desiring to dredge or fill coastal wetlands was required to file a notice of intent with the Director of Marine Fisheries who was then empowered to issue an "order of conditions" similar to that in the present Wetlands Protection Act.<sup>37</sup> The town of Falmouth passed a zoning by-law which required a local zoning permit in addition to the authorization of the Marine Fisheries Director. The plaintiff in *Golden*, after receiving an order

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<sup>29</sup> Act of Dec. 22, 1975, ch. 808, 1975 Mass. Acts 1112 (current version at MASS. GEN. LAWS ANN. ch. 40A, §§ 1-17 (West 1979)).

<sup>30</sup> Act of May 3, 1954, ch. 368, 1954 Mass. Acts 244.

<sup>31</sup> *Id.* § 2; Act of Dec. 22, 1975, ch. 808, § 2A, 1975 Mass. Acts 1112, 1114.

<sup>32</sup> Act of May 3, 1954, ch. 368, § 2, 1954 Mass. Acts 244.

<sup>33</sup> *Id.*

<sup>34</sup> See Dawson, *Protecting Massachusetts Wetlands*, 12 SUFFOLK L. REV. 756 (1978).

<sup>35</sup> 358 Mass. 519, 265 N.E.2d 573 (1970).

<sup>36</sup> The Jones Act, Act of May 22, 1963, ch. 426, 1963 Mass. Acts 240 (repealed in 1972 with the passage of the Wetlands Protection Act).

<sup>37</sup> *Id.*

of conditions from the director, was refused the local permit and therefore challenged the validity of the by-law. The court upheld the by-law as a legitimate exercise of municipal zoning power. It decided that under the Zoning Enabling Act municipalities could enact wetlands by-laws and ordinances parallel to the state wetlands regulations and thus strengthen the protection of local wetlands.<sup>38</sup>

The substantive limits to the use of zoning for wetlands protection were examined in *Turnpike Realty Co. v. Dedham*,<sup>39</sup> where the court addressed the validity of a zoning by-law which created a flood plain district in which construction was forbidden without a permit. The by-law had four stated purposes: (1) the preservation of the ground water table; (2) the promotion of public health and safety by protecting persons and property from flooding; (3) the protection of the community from the costs which may be incurred due to building in unsuitable, flood-prone areas; and (4) the conservation of natural conditions, wildlife, and open space for public education, recreation and general welfare.<sup>40</sup>

The court found that the first three purposes promoted the general welfare and were therefore within the authority granted by the Zoning Enabling Act.<sup>41</sup> The fourth purpose, however, the court classified as "aesthetic considerations" which "may not be disregarded in determining the validity of a zoning by-law, but . . . [which] . . . do not alone justify restrictions upon private property . . . ."<sup>42</sup> The court upheld the by-law on the basis of the first three stated purposes, and treated aesthetics as an ancillary purpose which would not defeat an otherwise valid by-law.<sup>43</sup>

The Supreme Judicial Court's unwillingness to uphold zoning by-laws based on aesthetic considerations alone can also be seen in

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<sup>38</sup> *Golden v. Board of Selectmen of Falmouth*, 358 Mass. 519, 523, 165 N.E.2d 573, 576 (1970).

<sup>39</sup> 362 Mass. 221, 284 N.E.2d 891 (1972), *cert. denied*, 409 U.S. 1108 (1973).

<sup>40</sup> *Id.* at 227, 284 N.E.2d at 895-96.

<sup>41</sup> *Id.* at 229, 284 N.E.2d at 896. See *Dunham, Flood Control via the Police Power*, 107 U. PA. L. REV. 1098 (1959).

<sup>42</sup> *Turnpike Realty Co. v. Town of Dedham*, 362 Mass. 221, 229, 284 N.E.2d 891, 896 (1972), *cert. denied*, 409 U.S. 1108 (1973). See *Barney and Carey Co. v. Town of Milton*, 324 Mass. 440, 87 N.E.2d 9 (1949); but see *Donnelly v. Outdoor Advertising Board*, 369 Mass. 206, 339 N.E.2d 709 (1975), where the Supreme Judicial Court found that in the context of outdoor advertising, aesthetics alone may be a permissible legislative purpose under both the state police power and the Zoning Enabling Act.

<sup>43</sup> *Turnpike Realty Co. v. Town of Dedham*, 362 Mass. 221, 229, 284 N.E.2d 891, 896 (1972).



*MacGibbon v. Board of Appeals of Duxbury*.<sup>44</sup> In that case, the town passed a zoning by-law which required a permit for wetlands development. The plaintiffs were denied a permit to excavate and fill some coastal lots which they owned. They claimed that the town was arbitrarily refusing to grant permits in order to preserve the waterfront in its natural state. The court held that "[t]he preservation of privately owned land in its natural, unspoiled state for the enjoyment and benefit of the public by preventing the owner from using it for any practical purpose is not within the scope and limits of any power or authority delegated to municipalities under the Zoning Enabling Act."<sup>45</sup>

As can be seen from the *Golden, Turnpike*, and *MacGibbon* decisions, the Zoning Enabling Act gave municipalities substantial, although not unlimited powers to regulate wetlands development. These powers were continued if not expanded by the new Zoning Act.<sup>46</sup> Insofar as it affects wetlands, the major difference between the two statutes is the expansion in the Zoning Act of the expressly stated purposes for which a town or city may zone.<sup>47</sup> The Zoning Act explicitly allows the zoning objectives of pollution prevention, regulation of flood plains and wetlands to encourage most appropriate use, the provision for open spaces, and "the development of the natural, scenic and aesthetic qualities of the community."<sup>48</sup> The long-term significance of these changes is not yet evident. Many of the zoning purposes expressly stated in the Zoning Act can be, and have been construed to fall within the public welfare

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<sup>44</sup> *MacGibbon v. Board of Appeals of Duxbury*, 347 Mass. 690, 200 N.E.2d 254 (1964) (*MacGibbon I*); *MacGibbon v. Board of Appeals of Duxbury* 356 Mass. 635, 255 N.E.2d 347 (1970) (*MacGibbon II*); *MacGibbon v. Board of Appeals of Duxbury*, 369 Mass. 512, 340 N.E.2d 487 (1976), *rehearing denied*, 369 Mass. 523, 344 N.E.2d 185 (1976) (*MacGibbon III*). The discussion here does not attempt to cover all of the arguments raised in the complex *MacGibbon* litigation, which lasted approximately twelve years. For a detailed analysis of *MacGibbon* and a discussion of wetlands zoning cases in Massachusetts, see Dawson, *Protecting Massachusetts Wetlands*, 12 SUFFOLK L. REV. 755 (1978).

<sup>45</sup> *MacGibbon v. Board of Appeals of Duxbury*, 356 Mass. 635, 640-41, 255 N.E.2d 347, 351 (1970) (*MacGibbon II*).

<sup>46</sup> Act of Dec. 22, 1975, ch. 808, 1975 Mass. Acts 1112 (current version at MASS. GEN. LAWS ANN. ch. 40A, §§ 1-17 (West 1979)).

<sup>47</sup> *Id.* § 2A at 1114, *reprinted in note*, MASS. GEN. LAWS ANN. ch. 40A, § 1 (West 1979). The Zoning Act also expressly forbids a zoning ordinance or by-law to exempt land or buildings from floodplain or wetlands regulations established pursuant to general law. MASS. GEN. LAWS ANN. ch. 40A, § 3 (West 1979).

<sup>48</sup> Act of Dec. 22, 1975, ch. 808, § 2A, 1975 Mass. Acts 1112, 1114, *reprinted in note* MASS. GEN. LAWS ANN. ch. 40A, § 1 (West 1979).

standard employed by the Zoning Enabling Act.<sup>49</sup> However, the Zoning Act does clarify the intent of the state legislature to promote wetlands zoning regulations, and it may force the court to base future decisions on constitutional rather than statutory grounds. For example, if the *MacGibbon* case had been decided under the Zoning Act, the court could not have held that the Duxbury by-law went beyond the purposes authorized by the Act. Instead, it would have been forced to decide the case on the constitutional issue of taking without due process of law.<sup>50</sup>

Although substantively Massachusetts municipalities have broad authority to zone for wetlands protection, the use of zoning presents numerous procedural obstacles. Briefly, the procedure for adoption or alteration of zoning by-laws under the Zoning Act is as follows.<sup>51</sup> A zoning proposal must be submitted to the city council or board of selectmen which will forward it to the local planning board. The planning board, after complying with the substantial notice requirements in the Zoning Act,<sup>52</sup> holds a public hearing on the proposal and then submits its report to the city council or town meeting. There the proposal must be passed by a two-thirds majority vote. A zoning proposal which does not receive the necessary two-thirds vote may not be considered again for two years unless it has received a favorable report from the planning board. Finally, both zoning and non-zoning town by-laws require the approval of the state attorney general.<sup>53</sup>

Besides the precise notice requirements and the need for a two-thirds majority vote for adoption, zoning by-laws have two major post-enactment procedural limitations which non-zoning by-laws may circumvent. First, the Zoning Act provides exemptions from zoning by-laws and ordinances for those who can prove prior non-conforming uses of their property.<sup>54</sup> Although non-zoning by-laws may not ban pre-existing uses outright, they can be employed to minimize the effects of such uses.<sup>55</sup> Second, the Act constructs a

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<sup>49</sup> See *Turnpike Realty Co. v. Town of Dedham*, 362 Mass. 221, 227-28, 284 N.E.2d 891, 896 (1972), *cert. denied*, 409 U.S. 1108 (1973); *Dunham, Flood Control Via the Police Power*, 107 U. PA. L. REV. 1098 (1959).

<sup>50</sup> U.S. CONST. amend. V; U.S. CONST. amend. XIV § 1; see notes 3 and 44 *supra*.

<sup>51</sup> MASS. GEN. LAWS ANN. ch. 40A, § 5 (West 1979).

<sup>52</sup> *Id.*

<sup>53</sup> MASS. GEN. LAWS ANN. ch. 40, § 32 (West Supp. 1980). City ordinances do not require the attorney general's approval.

<sup>54</sup> MASS. GEN. LAWS ANN. ch. 40A, § 6 (West 1979).

<sup>55</sup> For a discussion of means to minimize prior non-conforming use requirements through

special appeal process through a local zoning board of appeals.<sup>56</sup> Applicants who have been denied permits first seek review from the board of appeals which may grant special permits or variances. Then, if turned down by the board of appeals, an applicant can still obtain a broad de novo review in Superior Court.<sup>57</sup> Under non-zoning ordinances and by-laws, appeal is directly to the Superior Court under the narrower standards of certiorari review.<sup>58</sup>

### C. *The Earth Removal Statute*

Given the complex procedure required to enact and enforce zoning by-laws and ordinances, it is usually to the advantage of a Massachusetts municipality to act through non-zoning powers. Apart from home rule powers<sup>59</sup> this means that the municipality must act under a different statutory authorization from the state legislature. In the context of wetlands protection the most important statutory authorization other than the Wetlands Protection and Zoning Acts is the state earth removal statute.<sup>60</sup> The earth removal statute authorizes towns to enact by-laws "not repugnant to law"<sup>61</sup> regulating or prohibiting the removal of soil, loam, sand or gravel from private land in the whole town or specified districts.<sup>62</sup> The courts have held that the earth removal statute is an authorization separate from the state zoning scheme,<sup>63</sup> that under its authority towns can regulate earth removal without following the zoning procedures,<sup>64</sup> and that a town may employ both zoning by-laws and non-zoning earth removal by-laws simultaneously.<sup>65</sup>

These decisions demonstrate that the Massachusetts courts are

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the earth removal authorization, MASS. GEN. LAWS ANN. ch. 40, § 21(17) (West Supp. 1980), see Dawson, *Earth Removal and Environmental Protection*, 3 ENV. AFF. 166, 171-72 (1974).

<sup>56</sup> MASS. GEN. LAWS ANN. ch. 40A, §§ 12, 14 (West 1979).

<sup>57</sup> *Id.* § 17.

<sup>58</sup> In Massachusetts, certiorari is authorized by MASS. GEN. LAWS ANN. ch. 249, § 4 (West Supp. 1980). This procedure provides for review of judicial or quasi-judicial proceedings where the aggrieved party has no other reasonably adequate remedy and has suffered a substantial injury or injustice from the proceeding under review. See *Boston Edison Co. v. Board of Selectmen of Concord*, 355 Mass. 79, 242 N.E.2d 868 (1968).

<sup>59</sup> See text at notes 68-97 *infra*.

<sup>60</sup> MASS. GEN. LAWS ANN. ch. 40, § 21(17) (West Supp. 1980). See Dawson, *Earth Removal and Environmental Protection*, 3 ENV. AFF. 166 (1974).

<sup>61</sup> MASS. GEN. LAWS ANN. ch. 40, § 21 (West Supp. 1980).

<sup>62</sup> *Id.* § 21(17).

<sup>63</sup> *Byrne v. Town of Middleborough*, 364 Mass. 331, 304 N.E.2d 194 (1973).

<sup>64</sup> *Id.*

<sup>65</sup> *Goodwin v. Hopkinton*, 358 Mass. 164, 261 N.E.2d 60 (1970). See note 144 *infra*.

willing to uphold some municipal land-use regulation apart from the zoning power. However, regulation of wetlands development is only partly possible through the earth removal statute because the statute is a substantively narrow authorization. It empowers local regulation of earth removal only in order to minimize harms reasonably related to earth removal.<sup>66</sup> While these may include depreciation of land values, noise, dust, erosion, or even water pollution,<sup>67</sup> the statute could not be stretched, for example, to cover the filling of a wetland.

This discussion of the Wetlands Protection Act, the Zoning Act, and the earth removal statute should indicate that although Massachusetts municipalities have a broad choice in the way that they can approach regulating the development of local wetlands, each of the possible means has its drawbacks. Action by local conservation commissions under the Wetlands Protection Act can be overruled by the state DEQE. The Zoning Act gives substantial local power but is procedurally demanding. The earth removal statute, conversely, is procedurally simple but substantively narrow. Yet, at least one alternative to these means is available: the use of municipal home rule powers.

### III. MUNICIPAL POWER UNDER HOME RULE

Home rule, which in one form or another has been adopted by a majority of the states,<sup>68</sup> is based on the concept that municipalities have or ought to have inherent power to legislate on local matters. Home rule thus reverses the longstanding presumption of "Dillon's Rule"<sup>69</sup> that a municipal corporation possesses only those powers expressly granted to it, those necessarily or fairly implied from the powers expressly granted, and those powers essential to the declared purposes of the corporation.<sup>70</sup> Thus, under home rule, in-

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<sup>66</sup> See *Beard v. Town of Salisbury*, 79 Mass. Adv. Sh. 1703, 392 N.E.2d 832 (1979).

<sup>67</sup> See Dawson, *Earth Removal and Environmental Protection*, 3 ENV. AFF. 166, 176, 180 (1974).

<sup>68</sup> See LEGISLATIVE RESEARCH COUNCIL, REPORT RELATIVE TO MUNICIPAL HOME RULE, MASS. SENATE REP. NO. 580 (1961).

<sup>69</sup> DILLON, 1 MUNICIPAL CORPORATIONS § 237 at 449-50 (5th ed. 1911).

<sup>70</sup> *Id.* See *Del Duca v. Town Administrator of Methuen*, 368 Mass. 1, 10, 329 N.E.2d 748, 754 (1975). The home rule system adopted by some states goes beyond giving a presumption of validity to local enactments and creates a sphere of municipal jurisdiction in local matters within which a home rule unit can legislate to the exclusion of the state. See, e.g. CAL. CONST. art. XI, § 5. This article deals primarily with the form of home rule adopted in Massachusetts. See note 71 *infra*.

stead of the state legislature having to authorize a municipality to enact by-laws or ordinances on a subject, the presumption is shifted to allow municipalities to take action on local matters unless specifically prohibited by the state.

Massachusetts towns and cities received home rule powers in 1966 with the adoption of Article 89 of the amendments to the state constitution.<sup>71</sup> Section 6 of Article 89 granted to towns and cities the ability, through the adoption of local by-laws and ordinances, to "exercise any power or function which the [state legislature] has power to confer upon [them] which is not inconsistent with the constitution or laws enacted by the [legislature] . . . ."<sup>72</sup> Thus, municipalities were granted broad police powers which were limited by the requirements that the subject matter of the by-laws and ordinances be local,<sup>73</sup> that they be not inconsistent with the state constitution or state statutes, and that they not infringe on powers expressly reserved by other sections of the amendment or prohibited to a town by its charter.<sup>74</sup>

Article 89's requirement that municipal by-laws and ordinances be not inconsistent with state law<sup>75</sup> amounts to a major reservation of power in the state legislature. When considered along with the power of the legislature to pass, by a two-thirds majority, "special"

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<sup>71</sup> MASS. CONST. amend. art. LXXXIX; MASS. GEN. LAWS ANN. ch. 43B (West Supp. 1980). See Comment, *State and Municipal Government: Home Rule*, 14 ANN. SURVEY MASS. LAW 264 (1967). For a discussion of environmental protection under home rule in Kansas, see Pierce, *Home Rule and Municipal Environmental Regulation in Kansas*, 26 KAN. L. REV. 535 (1978).

<sup>72</sup> MASS. CONST. amend. art. LXXXIX, § 6. The full text is as follows:

Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter. This section shall apply to every city and town, whether or not it has adopted a charter pursuant to section three.

<sup>73</sup> *Id.* The requirement that home rule enactments be limited to "local" matters has been subject to different judicial interpretations. Compare *Bloom v. City of Worcester*, 363 Mass. 136, 148, 293 N.E.2d 268, 276 (1973) with *City of Des Plaines v. Chicago & N.W. Ry.*, 65 Ill. 2d 1, 5, 357 N.E.2d 433, 435 (1976).

<sup>74</sup> MASS. CONST. amend. art. LXXXIX, §§ 6, 7. Section seven states that cities and towns are not granted the power to regulate certain elections, levy or collect taxes, borrow money, dispose of parkland, enact laws governing civil relationships "except as an incident to an exercise of independent municipal power," define felonies, or impose imprisonment in punishment for a violation of any law.

<sup>75</sup> MASS. CONST. amend. art. LXXXIX, § 6.

laws which pertain to a single city or town,<sup>76</sup> it may be seen that this reservation in the state amounts to a veto power over local by-laws and ordinances. For example, if a town or towns passed by-laws regulating a subject that the legislature felt was inappropriate for local regulation, the legislature could pass a law pre-empting the field from local enactments.

Although at first glance this veto power in the state legislature may appear to cripple home rule in Massachusetts, the ultimate retention of power at the state level, as some commentators have pointed out,<sup>77</sup> may have proved to be a blessing in disguise. The judiciaries of some other home rule states, fearful of granting too much power to local governments, have taken a restrictive view of home rule powers.<sup>78</sup> Typically, municipal authority has been limited by a narrow judicial view of what topics are in fact "local" and therefore subject to home rule regulation.<sup>79</sup> Alternatively, where a state's home rule plan provides for pre-emption of local powers by state legislation, the judiciary can narrow local authority through its interpretation of legislative intent to pre-empt.<sup>80</sup> In Massachusetts, perhaps because of the clear retention of power at the state level, home rule enactments have received predominantly favorable treatment from the state courts.

The leading Massachusetts decision which announced standards

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<sup>76</sup> *Id.* § 8.

<sup>77</sup> Comment, *State and Municipal Government: Home Rule*, 14 ANN. SURVEY MASS. LAW 264, 277 (1967).

<sup>78</sup> See, e.g., *City of Des Plaines v. Chicago & N.W. Ry.*, 65 Ill.2d 1, 357 N.E.2d 433 (1976); *Metropolitan Sanitary District v. City of Des Plaines*, 63 Ill.2d 256, 347 N.E.2d 716 (1976); *Salzman v. Impellitteri*, 305 N.Y. 414, 113 N.E.2d 543 (1953); *Newport Amusement Co. v. Maher*, 92 R.I. 51, 166 A.2d 216 (1960); Bornstein, *Sanitary Landfill Permits in Illinois: State Pre-emption of Home Rule Zoning Powers*, 8 LOY. CHI. L. J. 353 (1977); Comment, *Home Rule and the New York Constitution*, 66 COLUM. L. REV. 1145, 1148-49 (1966); Minetz, *Recent Illinois Supreme Court Decisions Concerning the Authority of Home Rule Units to Control Environmental Problems*, 26 DEPAUL L. REV. 306 (1977). But see Sandalow, *The Limits of Municipal Power Under Home Rule*, 48 MINN. L. REV. 643 (1964).

<sup>79</sup> For example, the Supreme Court of Illinois, in *City of Des Plaines v. Chicago & N.W. Ry.*, 65 Ill.2d 1, 357 N.E.2d 433 (1976), determined that noise pollution was "not an environmental problem of local concern" because noise can cross municipal boundaries. *Id.* at 7, 357 N.E.2d at 436. By adopting such positions, courts can practically eliminate home rule authority. However, if there is any issue that truly is local, it is a property issue. Home rule provisions often create express local authority to act on "property" matters. See, e.g., N.Y. CONST. art. IX, § 2(c). Wetlands ordinances and by-laws should at least pass the test of being "local" enactments. Yet, this is only the first hurdle. Local wetlands enactments can still be interpreted as being inconsistent with or pre-empted by state law and, therefore, void.

<sup>80</sup> See *City of Des Plaines v. Chicago & N.W. Ry.*, 65 Ill.2d 1, 357 N.E.2d 433 (1976).

for determining the existence of an inconsistency between state law and local by-laws and ordinances is *Bloom v. City of Worcester*.<sup>81</sup> The issue in that case was the validity of a city ordinance that conferred subpoena powers on a local human rights commission. It was argued that the ordinance was inconsistent with the state Human Rights Act<sup>82</sup> and with Massachusetts General Laws chapter 233, section 8 which granted subpoena powers to some local agencies but did not mention local human rights commissions.<sup>83</sup> The court, after deciding that human rights was a local as well as a state issue, considered what standard of "inconsistency" to adopt for home rule enactments. It analogized the situation to federal pre-emption cases where the existence of a federal statute on a subject may preclude state regulation of the same subject<sup>84</sup> and to state statutes such as the earth removal authorization which allow local action only if "not repugnant to law."<sup>85</sup> The court, concluding that the "inconsistency" standard to be used in home rule cases should be substantially the same as in these other pre-emption situations, held that "[t]he legislative intent to preclude local action must be clear."<sup>86</sup> The court noted that the intent to pre-empt may be inferred from comprehensive state legislation on a subject matter or by an explicit limitation in the way cities and towns may act on that subject, but the court made it apparent that it would not infer state intent to occupy a field of legislation whenever the state legislature acted on a subject. "If the State legislative purpose can be achieved in the face of a local ordinance or by-law on the same subject, the local ordinance or by-law is not inconsistent with the State legislation, unless the Legislature has expressly forbidden the adoption of local ordinances and by-laws on that subject."<sup>87</sup>

Since there was no apparent legislative intent behind the Human Rights Act to preclude local actions on the same subject matter, the court considered whether the Worcester ordinance frustrated the achievement of any statutory purpose. It determined that neither the existence of the local human rights commission

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<sup>81</sup> 363 Mass. 136, 293 N.E.2d 268 (1973).

<sup>82</sup> MASS. GEN. LAWS ANN. ch. 151B (West Supp. 1980).

<sup>83</sup> *Id.* ch. 233, § 8.

<sup>84</sup> See Comment, *Preemption Doctrine in the Environmental Context: A Unified Method of Analysis*, 127 U. PA. L. REV. 197 (1978).

<sup>85</sup> MASS. GEN. LAWS ANN. ch. 40, § 21 (West Supp. 1980); *Commonwealth v. Baronas*, 285 Mass. 321, 322, 189 N.E. 62, 63 (1934).

<sup>86</sup> *Bloom v. City of Worcester*, 363 Mass. 136, 155, 293 N.E.2d 268, 280 (1973).

<sup>87</sup> *Id.* at 156, 293 N.E.2d at 280-81.

nor its use of the subpoena power was inconsistent with state law, but rather that the commission furthered the purposes of the state legislation.<sup>88</sup> The Worcester ordinance was therefore a valid home rule enactment.

In some instances the Supreme Judicial Court has determined that state legislation was intended to pre-empt its subject matter from local action.<sup>89</sup> Most significant to the issue of wetlands protection is the court's decision that the legislature intended to occupy the field of zoning.<sup>90</sup> Because of this pre-emption, a municipality may enact zoning by-laws or ordinances only for the purposes allowed by the Zoning Act and only by the procedures set out in the Zoning Act. It cannot zone under its home rule powers.

Given this prohibition of home rule zoning, a need arises to define what a zoning enactment is. More precisely, it is necessary to define the limits of the subject matter pre-empted by the Zoning Act. For example, can a town enact non-zoning by-laws on subjects that could be dealt with through zoning, or must it use zoning procedures for any subject that could conceivably be dealt with by a zoning by-law?

Clearly, a town must not be able to circumvent the Zoning Act simply by stating that its by-laws are all non-zoning and that therefore it need not follow zoning procedures. Some municipal enactments, such as those regulating the heights of buildings or the sizes of lots, are unquestionably zoning enactments and should be subject to Zoning Act procedures. Yet, it does not necessarily follow that all land use regulations are zoning enactments. For example, the Supreme Judicial Court has held that earth removal by-laws, which clearly involve land use, may be adopted pursuant to either the earth removal statute or the Zoning Act.<sup>91</sup> Thus to some undefined extent, land use can be regulated through non-zoning powers.

The Supreme Judicial Court considered the distinction between zoning and non-zoning municipal enactments in *Rayco Investment Corp. v. Selectman of Raynham*.<sup>92</sup> In *Rayco*, a corporate land-

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<sup>88</sup> *Id.* at 158-60, 293 N.E.2d at 281-83.

<sup>89</sup> *E.g.*, *Middlesex & Boston St. Ry. Co. v. Board of Aldermen*, 371 Mass. 849, 856-57, 359 N.E.2d 1279, 1283 (1977); *Del Duca v. Town Administrator of Methuen*, 368 Mass. 1, 329 N.E.2d 748 (1975); *Town of Canton v. Bruno*, 361 Mass. 598, 282 N.E.2d 87 (1972).

<sup>90</sup> *Middlesex & B.S.R. Co. v. Board of Alderman*, 371 Mass. 849, 359 N.E.2d 1279 (1977); *Town of Canton v. Bruno*, 361 Mass. 598, 608, 282 N.E.2d 87, 92 (1972).

<sup>91</sup> *Byrne v. Town of Middleborough*, 364 Mass. 331, 334, 304 N.E.2d 194, 196 (1973).

<sup>92</sup> 368 Mass. 385, 331 N.E.2d 910 (1975).



owner in the town of Raynham submitted a proposal to the town planning board under which its land would be used as a trailer park. A few days later, the town passed a by-law limiting the number of trailer parks that would be permitted in the town. This by-law would have been invalid if viewed as a zoning by-law: the Zoning Enabling Act provided for a three-year freeze on zoning amendments affecting the use of a particular parcel of land once the planning board had received a plan for the land's use.<sup>93</sup> The town, however, claimed that it had authority to regulate trailer parks under its independent police powers and that the by-law should be viewed as a valid non-zoning application of those powers.

The Supreme Judicial Court decided that the disputed by-law in *Rayco* should be seen as an amendment to the town zoning by-laws and was therefore invalid.<sup>94</sup> It reached this decision primarily because Raynham already had detailed zoning regulations for trailer parks.<sup>95</sup> In light of this fact, the court decided: "Whether or not a by-law limiting the maximum number of trailer park licenses might in some circumstances be grounded in the town's police power apart from the zoning power, we nonetheless conclude that in this instance the by-law must be viewed as a zoning regulation."<sup>96</sup>

The court's conclusion in *Rayco* was clearly correct. An unlimited ability of a town to regulate land use under the guise of its home rule police powers would effectively circumvent the state zoning laws. This is just what the town of Raynham attempted to do in the *Rayco* case. Yet, the *Rayco* decision was expressly limited to the facts of that case. It did not attempt the difficult task of

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<sup>93</sup> Act of April 17, 1957, ch. 297, 1957 Mass. Acts 190; as amended by Act of April 27, 1965, ch. 366, 1965 Mass. Acts 195.

<sup>94</sup> *Rayco Investment Corp. v. Selectmen of Raynham*, 368 Mass. 385, 393, 331 N.E.2d 910, 915 (1975).

<sup>95</sup> The Raynham zoning by-law required the board of health to administer trailer park regulations. Board of health approval of a trailer park was based on its consideration (as required by the existing zoning by-law) of: detriment to neighborhood character; total number of parking spaces available for trailers; the percentage of the park devoted to dwelling lots; street frontage; minimum lot dimensions; access drives and parking; adequacy and convenience of water and electricity; and sewage facilities. Raynham, Mass. By-laws and Zoning By-laws, § 1 (1955), Record at 35-37, *Rayco Investment Corp. v. Selectmen of Raynham*, 368 Mass. 385, 331 N.E.2d 910 (1975). The zoning by-law did not expressly limit the number of trailer parks allowed in the town.

<sup>96</sup> *Rayco Investment Corp. v. Selectmen of Raynham*, 368 Mass. 385, 392, 331 N.E.2d 910, 914 (1975).

drawing an effective line between zoning and non-zoning by-laws.

As may be seen from the *Bloom* and *Rayco* cases, the possible use of home rule powers for wetlands protection depends largely on the courts' interpretation of the intent behind any existing state statutes which treat the subject matter. Faced with a by-law and one or more statutes that cover the same subject, the court must first determine whether any of the statutes were intended to occupy the field of the legislation to the exclusion of municipal enactments. If no intent to pre-empt exists, the court will follow the reasoning of *Bloom* and consider whether the by-law is consistent with the purposes of the state legislation. However, if the court finds that one or more of the statutes were intended to pre-empt their subject matter, it must still determine the extent of the pre-emption and decide, as it did in *Rayco*, whether the by-law falls inside or outside of the pre-empted field. This was the basic analysis conducted by the Supreme Judicial Court in *Lovequist v. Town of Dennis*.<sup>97</sup>

#### IV. LOVEQUIST V. CONSERVATION COMMISSION OF THE TOWN OF DENNIS

##### A. Background

In *Lovequist* the Supreme Judicial Court considered the validity of a town by-law which established a permit system for wetlands development that substantially paralleled the permit system of the Massachusetts Wetlands Protection Act.<sup>98</sup> Under the Dennis by-law, any person wishing to alter a wetland must obtain a second permit from the town conservation commission in addition to the permit required by the Wetlands Protection Act. In deciding whether to grant the local permit, the commission is required to consider not only whether the proposal will significantly affect water supply, ground water, flood control, storm damage, pollution, shellfish, or fisheries as required by the Wetlands Protection Act, but also whether it would affect erosion, wildlife, recreation, or aesthetics.<sup>99</sup> If the commission determines that the proposal will

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<sup>97</sup> *Lovequist v. Conservation Commission of the Town of Dennis*, 79 Mass. Adv. Sh. 2210, 393 N.E.2d 858 (1979).

<sup>98</sup> See text at notes 21-28 *supra*.

<sup>99</sup> *Dennis, Mass. By-laws*, art. XV, § 1 (1973). The by-law reads, in relevant part:

1. The purpose of this by-law is to protect the foreshores and wetlands of the Town of Dennis by controlling activities deemed to have a significant effect upon wetland values, including but not limited to the following: Public or private water supply, groundwater,

significantly affect one or more of these wetland values, it is empowered not only to impose conditions on the proposed work,<sup>100</sup> but also to prohibit the development.<sup>101</sup> This additional power is not expressly granted by the Wetlands Protection Act.<sup>102</sup> Thus, the substantive effect of the Dennis by-law is to broaden the power granted to the town conservation commission.

Procedurally, the notice and hearing requirements of the Wetlands Protection Act may be used to satisfy the town by-law. However, appeal from the commission's decision under a home rule by-law is directly in Superior Court,<sup>103</sup> skipping the DEQE review provided for in the Wetlands Protection Act.<sup>104</sup> The difference in appeals procedure is significant because under the *de novo* review of the Wetlands Protection Act, the DEQE can substitute its policy judgment for that of the local commission even if the commission committed no clear error in its decision. The Dennis by-law avoids the DEQE review and replaces it with a certiorari appeal to Superior Court.<sup>105</sup> Under certiorari, the court is empowered only to cor-

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flood control, erosion control, storm damage, water pollution, fisheries, shellfish, wildlife, recreation and esthetics. No person shall remove, fill, dredge, or alter any bank, fresh water wetland, coastal wetland, beach, dune, flat, marsh, meadow, bog, swamp, or lands bordering on the ocean or on any estuary, creek, river, stream, pond or lake, or any land under said waters or any land subject to tidal action, coastal storm flowage, or flooding, other than in the course of maintaining, repairing or replacing, but not substantially changing or enlarging, an existing and lawfully located structure or facility used in the service of the public and used to provide electric, gas, water, telephone, telegraph and other telecommunication services, without filing written notice of his intention to so remove, fill, dredge or alter and without receiving and complying with an order of conditions and provided all appeal periods have elapsed. Such notice shall be sent by certified mail to the Dennis Conservation Commission, including such plans as may be necessary to describe such proposed activity and its effect on the environment. The same notice, plans and specifications required to be filed by an applicant under Massachusetts General Laws, Chapter 131, Section 40, will be accepted as fulfilling the requirements of this by-law. The said Commission, in its discretion, may hear any oral presentation under the provisions of said Chapter 131, Section 40, of the Massachusetts General Laws . . . .

4. The Conservation Commission is empowered to deny permission for any removal, dredging, filling, or altering of subject lands within the town if, in its judgment, such denial is necessary to preserve environmental quality of either or both the subject lands and contiguous lands. Due consideration shall be given to possible effects of the proposal on all values to be protected under this by-law and to any demonstrated hardship on the petitioner by reason of a denial, as brought forth at the public hearing.

<sup>100</sup> *Id.* MASS. GEN. LAWS ANN. ch. 131, § 40 (West Supp. 1980).

<sup>101</sup> Dennis, Mass. By-Laws, Article XV, § 4 (1973). See note 99 *supra*.

<sup>102</sup> See MASS. GEN. LAWS ANN. ch. 131, § 40 (West Supp. 1980).

<sup>103</sup> See MASS. GEN. LAWS ANN. ch. 249, § 4 (West Supp. 1980).

<sup>104</sup> MASS. GEN. LAWS ANN. ch. 131, § 40 (West Supp. 1980).

<sup>105</sup> MASS. GEN. LAWS ANN. ch. 249, § 4 (West Supp. 1980). See note 26 *supra*.

rect substantial legal errors made by the commission.<sup>106</sup> It cannot substitute its policy judgment for that of the commission. Thus, a conservation commission ruling under the by-law is less likely to be overturned than the same decision made under the Wetlands Protection Act. The net effect of the by-law is, therefore, not only to increase the substantive power of the town conservation commission but also to buttress its authority procedurally.

The plaintiffs in the *Lovequist* case were the trustees of land located in the town of Dennis. The land consisted of approximately fourteen acres of wetland and a "neck" of twenty-six acres of upland. The plaintiffs wanted to build a subdivision of single family houses on the upland, with an access road to be built over the marsh to the upland. Without the proposed road, the only access to the upland was an old dirt road which the court found would be adequate for one single-family home. Accordingly, a notice of intent was filed with the Dennis conservation commission and hearings were held. The commission denied the application under both the town by-law and the Wetlands Protection Act on the basis of its finding that the road construction would cause serious groundwater and water pollution problems. The plaintiffs appealed the decision under the Wetlands Protection Act to the DEQE where, as of the date of the *Lovequist* decision, the case was still pending. The commission decision under the by-law was appealed to Superior Court where it was upheld. The case was then transferred to the Supreme Judicial Court.<sup>107</sup>

On appeal, the plaintiffs argued that the Dennis by-law was inconsistent with both the Wetlands Protection Act and the Zoning Enabling Act and was thus an invalid use of the town's home rule powers.<sup>108</sup> The plaintiffs' claim of "inconsistency"<sup>109</sup> between the

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<sup>106</sup> See *Boston Edison Co. v. Board of Selectmen of Concord*, 355 Mass. 79, 87, 242 N.E.2d 868, 873-74 (1968).

<sup>107</sup> *Lovequist v. Town of Dennis*, 79 Mass. Adv. Sh. 2210, 2211-13, 393 N.E.2d 858, 860-61 (1979).

<sup>108</sup> The plaintiffs also argued the issues of bias, lack of substantial evidence, and taking without due process of law. They were unsuccessful in these arguments. *Id.* at 2220-27, 393 N.E.2d at 864-66.

The parties argued the *Lovequist* case under the Zoning Enabling Act, which was in effect when the action was originally filed. However, the Supreme Judicial Court considered the case and wrote its opinion well after the Zoning Act took effect. (All municipal zoning by-laws and ordinances enacted prior to 1975 had to be brought into conformity with the Zoning Act provisions by June 30, 1978. Act of Dec. 22, 1975, ch. 808 § 5, 1975 Mass. Acts 1112, 1131-32.)

In Massachusetts, statutes enacted while litigation is in progress are given retroactive ef-

by-law and the Wetlands Protection Act was based on the argument that the legislature had reason for adopting the Act in the form in which it was passed. For example, the DEQE review procedure was deliberately employed to safeguard the rights of applicants. The "order of conditions" mechanism was used to promote the philosophy that land use can be regulated to some extent but cannot be completely denied. Since the Act deliberately employed these mechanisms, the plaintiffs reasoned that Dennis should not be able to use its home rule powers to re-write the state legislation. To allow such re-writing would be inconsistent with the intent of the Wetlands Protection Act.<sup>110</sup>

The plaintiffs also argued that the Dennis by-law conflicted with the Zoning Enabling Act. Their reasoning was that the by-law regulated land use and was therefore a zoning enactment which had to employ zoning procedures. This argument has considerable appeal for two reasons. First, it is clear that the Zoning Enabling Act was intended to pre-empt the field of zoning from independent municipal action.<sup>111</sup> Therefore, if the Dennis by-law were substantively a zoning enactment, it must employ the state zoning procedures. Second, the plaintiffs argued that the by-law dealt with a subject matter that had to be regulated through zoning. To support this contention, they pointed to cases such as *Turnpike Realty*<sup>112</sup> where the Supreme Judicial Court had upheld wetlands by-laws passed under the zoning power. Since wetlands protection is clearly a permitted zoning purpose, the plaintiffs argued that the

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fect only when the changes for which they provide are procedural. *City Council of Waltham v. Vinciullo*, 364 Mass. 624, 307 N.E.2d 316 (1974). It therefore appears that the *Lovequist* decision was reached under the substantive provisions of the Zoning Enabling Act. This quirk of timing raises an interesting question on the authority of *Lovequist* under the Zoning Act. Since the Zoning Act authorized municipal wetlands zoning in more explicit terms than the Zoning Enabling Act (see text at notes 32-49 *supra*), it is at least arguable that the substantive field pre-empted by these two statutes differs. However, it seems unlikely that the Supreme Judicial Court will follow such an interpretation of the Zoning Act. The court did not distinguish the two statutes in the *Lovequist* opinion even though the change in the law was noted in the plaintiffs' brief. Brief for Plaintiffs at 15-16, *Lovequist v. Town of Dennis*, 79 Mass. Adv. Sh. 2210, 393 N.E.2d 855 (1979) [hereinafter cited as Plaintiffs' Brief]. It would be ironic if the legislature's attempt in the Zoning Act to strengthen the authority of a municipality to protect its wetlands were to result in the curbing of municipal home rule powers in the field. See note 132 *infra*.

<sup>109</sup> See text and notes at notes 71-80 *supra*.

<sup>110</sup> Plaintiffs' Brief, *supra* note 108, at 21-23.

<sup>111</sup> *Town of Canton v. Bruno*, 361 Mass. 598, 282 N.E.2d 87 (1972). See note 108 *supra*.

<sup>112</sup> *Turnpike Realty Co. v. Town of Dedham*, 362 Mass. 221, 284 N.E.2d 891 (1972), *cert. denied*, 409 U.S. 1108 (1973).

legislature intended municipalities to pass wetlands by-laws and ordinances under the zoning power only. To rule otherwise, they contended, would be to allow municipalities to circumvent the Zoning Enabling Act in a manner which the court had forbidden in *Rayco Investment Corp. v. Selectmen of Raynham*.<sup>113</sup>

The Supreme Judicial Court's analysis of the plaintiffs' claims under the Wetlands Protection Act and the Zoning Enabling Act will be considered separately.

### *B. The Dennis By-law and the Wetlands Protection Act*

The Dennis by-law differs from the Massachusetts Wetlands Protection Act in three aspects: (1) the wetland values which the conservation commission must seek to protect,<sup>114</sup> (2) the authorization of the commission to limit wetlands development,<sup>115</sup> and (3) the appeal procedure.<sup>116</sup>

In examining the first of these differences for inconsistency, the actual holding of the case should be clearly defined. The Supreme Judicial Court upheld the conservation commission's permit denial on the basis of the commission's finding that the proposed construction would cause serious groundwater depletion,<sup>117</sup> a value which is protected both under the Act and the Dennis by-law. The *Lovequist* decision did not examine the validity of the by-law requirement that the conservation commission consider the effect of the proposed development on erosion, wildlife, recreation, and aesthetics, i.e., the additional values protected under the by-law but not under the Act. However, the *Lovequist* decision clearly supports the view that the broadening by the Dennis by-law of the wetlands interests which the Wetlands Protection Act requires conservation commissions to consider should not be interpreted as a conflict with state law. The court emphasized that the by-law "furthers—rather than derogates from—the legislative purpose embodied in the Wetlands Protection Act"<sup>118</sup> and reiterated its earlier holding that the state wetland statutes set minimum standards only, leaving municipalities free to adopt more stringent

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<sup>113</sup> 368 Mass. 385, 331 N.E.2d 910 (1975). See Plaintiffs' Brief, *supra* note 108, at 9-21.

<sup>114</sup> See text and notes at note 99 *supra*.

<sup>115</sup> See text and notes at notes 100-101 *supra*.

<sup>116</sup> See text and notes at notes 103-106 *supra*.

<sup>117</sup> *Lovequist v. Town of Dennis*, 79 Mass. Adv. Sh. 2210, 2223-25, 393 N.E.2d 858, 865 (1979).

<sup>118</sup> *Id.* at 2219, 393 N.E.2d at 863.

standards.<sup>119</sup> In light of the court's reasoning, it is apparent that the addition of interests for conservation commissions to consider is a valid exercise of home rule powers.<sup>120</sup>

The second difference between the Wetlands Protection Act and the Dennis by-law is that the by-law expressly authorizes conservation commissions to deny permission to alter a wetland. This power was not expressly authorized by the Wetlands Protection Act. However, the DEQE regulations promulgated pursuant to the Act in fact empower commissions to prohibit harmful development.<sup>121</sup> Given this fact, the court, again stating that the by-law merely furthered the purposes of the Wetlands Protection Act rather than detracting from them, dismissed the plaintiffs' argument that this difference between the Wetlands Protection Act and the Dennis by-law amounted to an inconsistency.<sup>122</sup>

The final claim of inconsistency was based on the different procedures for administrative and judicial review. This was perhaps the plaintiffs' strongest argument for inconsistency between the Dennis by-law and the Wetlands Protection Act due to the significant differences between the Act and the by-law. However, the court found that the "disparity" in the review procedures did "not rise to the level of conflict,"<sup>123</sup> because the by-law did not deprive an aggrieved party of the rights of review available under non-zoning by-laws (i.e. an appeal to Superior Court under certiorari).<sup>124</sup>

At first, the court's response to this last claim of inconsistency may seem inappropriate. The fact that the by-law meets due process procedural requirements does not necessarily mean that it is consistent with state law. Yet here the court is faced with a procedural "disparity"<sup>125</sup> substantial enough for the plaintiffs to argue

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<sup>119</sup> *Golden v. Board of Selectmen of Falmouth*, 358 Mass. 519, 525, 265 N.E.2d 573, 577 (1970). See text at notes 35-38 *supra*.

<sup>120</sup> The legal soundness of these additional interests as valid purposes for the exercise of the police power is a separate issue which the court did not reach in *Lovequist*. See text at notes 3, 42-50 *supra*. There seems to be little doubt that erosion control is a proper police power purpose. See *MacGibbon v. Board of Appeals of Duxbury*, 369 Mass. 512, 519, 340 N.E.2d 487, 492 (1976) (*MacGibbon III*). Recreation, wildlife protection, and especially aesthetics may encounter difficulties with the argument that police power regulation for these purposes amounts to a taking of property without compensation. See notes 3 and 42 *supra*.

<sup>121</sup> 12 CODE OF MASS. REG. § 310.06(3) (1978).

<sup>122</sup> *Lovequist v. Town of Dennis*, 79 Mass. Adv. Sh. 2210, 2218-19, 393 N.E.2d 858, 863 (1979).

<sup>123</sup> *Id.* at 2220, 393 N.E.2d at 864 (1979).

<sup>124</sup> MASS. GEN. LAWS. ANN. ch. 249, § 4 (West Supp. 1980).

<sup>125</sup> *Lovequist v. Town of Dennis*, 79 Mass. Adv. Sh. 2210, 2220, 393 N.E.2d 858, 864

that the primary purpose of the by-law is to eliminate the administrative review provided for in the state Act,<sup>126</sup> and its response is merely to see if the requirements of minimum procedural due process have been met. The answer to this problem may lie in reading the court's approach in *Lovequist* as setting forth a standard for determining procedural inconsistency between municipal enactments and state laws which have not occupied the field of their subject matter. By requiring no more than procedural due process from the Dennis by-law, *Lovequist* may stand for the proposition that *procedural* differences between home rule by-laws and state statutes will not be deemed inconsistencies unless the state statute has pre-empted independent local action.

Such a reading of *Lovequist* does not conflict with other home rule cases. For example, in *Bloom* the court searched for possible inconsistency by asking whether "the State legislative purpose can be achieved in the face of a local ordinance or by-law on the same subject . . . ."<sup>127</sup> *Lovequist* suggests that the particular procedure employed by a state statute will not, in itself, be considered a "State legislative purpose" unless the statute has pre-empted the field of the legislation. Thus, when the court determined that the Wetlands Protection Act did not pre-empt the field but merely set minimum standards in an attempt to protect the state's wetlands,<sup>128</sup> it was holding that a municipality could strengthen those minimum standards not only substantively but also procedurally so long as minimum due process standards were met.

### C. *The Dennis By-law and Massachusetts Zoning*

In addition to the claim of conflict between the Dennis by-law and the Wetlands Protection Act, the plaintiffs in *Lovequist* al-

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(1979).

<sup>126</sup> Plaintiffs' Brief, *supra* note 108, at 23. See note 144 *infra*.

<sup>127</sup> *Bloom v. City of Worcester*, 363 Mass. 136, 156, 293 N.E.2d 268, 280-81 (1973). In other cases the Supreme Judicial Court has stated that a home rule by-law may not frustrate either the purpose or the implementation of a state statute. *Rayco Investment Corp. v. Selectmen of Raynham*, 368 Mass. 385, 394, 331 N.E.2d 910, 915 (1975); *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 360, 294 N.E.2d 393, 409 (1973). The exact significance of this distinction is not clear, and it was not referred to in the *Lovequist* decision. The court evidently did not feel that the different procedures under the Dennis by-law frustrated the implementation of the Wetlands Protection Act.

<sup>128</sup> *Lovequist v. Town of Dennis*, 79 Mass. Adv. Sh. 2210, 2219, 393 N.E.2d 858, 863 (1979); *Golden v. Selectment of Falmouth*, 358 Mass. 519, 526, 265 N.E.2d 573, 577 (1970).



leged a conflict with the Zoning Enabling Act.<sup>129</sup> The argument made was that the by-law regulated land use and thus fell within the subject area of zoning. The Supreme Judicial Court had previously held that the legislature, in enacting the Zoning Enabling Act, intended to pre-empt the subject of zoning from local by-laws and ordinances outside of the Act.<sup>130</sup> Therefore, if the Dennis by-law invaded the subject area of the state zoning law, it would have to be found to be inconsistent with the state legislation.<sup>131</sup>

Since it is clear that the zoning power includes the power to pass by-laws for wetlands and flood plain protection, the question that arises is whether a municipality must follow zoning procedures if it desires, outside the Wetlands Protection Act, to protect its wetlands or if instead it can use its home rule power to act on behalf of a purpose which could be reached by zoning.<sup>132</sup>

The plaintiffs analogized the situation to that of the trailer park by-law in *Rayco Investment Corp. v. Selectmen of Raynham*,<sup>133</sup> where the court held that the town could not circumvent the procedures of the Zoning Enabling Act by using home rule powers to limit the number of trailer parks in the town. The court in *Lovequist* found *Rayco* "readily distinguishable" because the Dennis by-law "manifests neither the purpose nor the effects of a zoning regulation."<sup>134</sup> As opposed to the situation in *Rayco* where Raynham had already enacted "comprehensive"<sup>135</sup> zoning regulations dealing with trailer parks, the town of Dennis had no history of

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<sup>129</sup> See text at notes 111-113 *supra*.

<sup>130</sup> *Town of Canton v. Bruno*, 361 Mass. 598, 282 N.E.2d 87 (1972).

<sup>131</sup> See note 108 *supra*.

<sup>132</sup> The plaintiffs in *Lovequist* argued that the adoption of the Zoning Act in 1975, along with the Act's expressly authorized zoning purposes, clarified the legislative intent to protect wetlands through zoning as opposed to home rule. Plaintiffs' Brief, *supra* note 108, at 15. The court did not directly respond to this argument in its decision. There is some merit in the plaintiffs' contention because chapter 808 of the 1975 Acts did state that "[t]his act is designed to provide standardized procedures for the administration and promulgation of municipal zoning laws." Act of Dec. 22, 1975, ch. 808, § 2A, 1975 Mass. Acts 1112, 1114. However, the standardization would apply only to zoning by-laws and ordinances and, significantly, the Act was also designed to promote the adoption of these zoning by-laws and ordinances "in accordance with the provisions of Article 89 of the Amendments to the Constitution and to achieve greater implementation of the powers granted to municipalities thereunder." *Id.* The intent of the Zoning Act was to provide greater protection for wetlands but not necessarily to the exclusion of municipal home rule regulation. See note 108 *supra*.

<sup>133</sup> 368 Mass. 385, 331 N.E.2d 910 (1975). See text at notes 92-96 *supra*.

<sup>134</sup> *Lovequist v. Town of Dennis*, 79 Mass. Adv. Sh. 2210, 2217, 393 N.E.2d 858, 862-63 (1979).

<sup>135</sup> *Id.* at 2218, 393 N.E.2d at 863.

wetlands or flood plain zoning. The court also noted that the purpose of this wetlands by-law was clearly to protect wetlands rather than to regulate the use of any particular parcel of land. Thus, although the court recognized that the by-law affected land use through its attempt to protect "wetland values," it declined to conclude that municipal regulations which "simply overlap with what may be the province of a local zoning authority" must be found to be zoning enactments.<sup>136</sup>

It is unclear exactly what lines, if any, the *Lovequist* decision has drawn between zoning and non-zoning by-laws. However, the court has obviously concluded that not all by-laws regulating land use need be seen as zoning by-laws. As the court mentions, this position has precedent in its decisions defining the extent of local regulation permissible under the earth removal statute.<sup>137</sup> The earth removal cases may act as a precedent for home rule by-laws and ordinances because they apply similar standards for compatibility with state law.<sup>138</sup> Specifically, the earth removal statute authorizes municipalities to enact only earth removal by-laws and ordinances which are "not repugnant to law," while Article 89 authorizes by-laws and ordinances only if "not inconsistent"<sup>139</sup> with state law. The court's analysis in *Bloom* indicates that these two standards are substantially the same.<sup>140</sup> Therefore, cases deciding whether earth removal by-laws are "repugnant" to the state zoning law may serve as precedent for cases such as *Lovequist* where the issue is possible "inconsistency" between a home rule by-law and the Zoning Enabling Act.<sup>141</sup>

Prior to the *Lovequist* decision, the Supreme Judicial Court had held that under the authority of the earth removal statute, towns could regulate earth removal without following zoning procedures.<sup>142</sup> It had also decided that towns may employ both zoning by-laws and non-zoning earth removal by-laws simultaneously.<sup>143</sup> Since earth removal by-laws usually regulate land use with a permit system similar to that of the Dennis wetlands by-law, the

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<sup>136</sup> *Id.*

<sup>137</sup> MASS. GEN. LAWS ANN. ch. 40, § 21 (West Supp. 1980).

<sup>138</sup> See text at notes 59-65 *supra*.

<sup>139</sup> MASS. CONST. amend. art. LXXXIX, § 6.

<sup>140</sup> *Bloom v. City of Worcester*, 363 Mass. 136, 152-57, 293 N.E.2d 268, 278-81 (1973). See text at notes 81-88 *supra*.

<sup>141</sup> See note 108 *supra*.

<sup>142</sup> *Byrne v. Town of Middleborough*, 364 Mass. 331, 304 N.E.2d 194 (1973).

<sup>143</sup> *Goodwin v. Hopkinton*, 358 Mass. 164, 261 N.E.2d 60 (1970).

court's position in *Lovequist* is at least consistent with its previous holdings. However, this consistency does not explain the court's reasoning that although both wetlands and earth removal by-laws regulate land use, they are not zoning by-laws.

An examination of the *Lovequist* decision suggests that four factors influenced the court's decision not to interpret the Dennis by-law as a zoning by-law. First, the town of Dennis, in enacting its by-law, clearly intended that it be a non-zoning by-law. This fact in itself distinguishes *Rayco*, where the town's intent at the time of enactment was not clear.<sup>144</sup>

Second, Dennis had no history of wetlands zoning. In *Rayco*, Raynham had a "comprehensive" zoning by-law regulating trailer parks, and the court interpreted the disputed by-law as a zoning amendment largely because of this fact.<sup>145</sup>

Third, although wetlands protection is a purpose for which a town may zone, it is not a traditional zoning purpose. Thus the court noted that wetland values "do not include air pollution, noise, demands for sewers and other municipal services, or the character of the community and the compatibility of nearby land uses, all typical of the concerns usually reflected in the zoning process."<sup>146</sup>

Fourth, the system of implementation employed by the Dennis wetlands by-law differs significantly from that of a typical zoning by-law. It does not prohibit or allow, on its face, any particular land use. Rather, "it specifies that permission be obtained from the conservation commission based on factual circumstances surrounding individual applications."<sup>147</sup> Given the clear municipal intent that the Dennis by-law be non-zoning, given the lack of any existing wetlands zoning in Dennis, and given the fact that the by-law's purposes and implementation differed from traditional zoning purposes and procedures, the court decided that the Dennis

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<sup>144</sup> This also follows the court's approach in *Goodwin* where it looked to municipal intent to see if the town zoning by-law voided its earth removal by-law. The court's position was that the town could choose to adopt earth removal by-laws instead of or along with zoning by-laws because it "may properly desire to have two separate ordinances or by-laws to avoid the involved and strict procedural requirements for adopting or amending zoning ordinances and by-laws." *Goodwin v. Hopkinton*, 358 Mass. 164, 170, 261 N.E.2d 60, 64 (1970).

<sup>145</sup> See text at note 95 *supra*.

<sup>146</sup> *Lovequist v. Town of Dennis*, 79 Mass. Adv. Sh. 2210, 2217, 393 N.E.2d 858, 863 (1979). See note 132 *supra*.

<sup>147</sup> *Lovequist v. Town of Dennis*, 79 Mass. Adv. Sh. 2210, 2217, 393 N.E.2d 858, 862 (1979).

by-law was not a zoning by-law.<sup>148</sup>

The *Lovequist* decision clearly upholds the validity of home rule wetlands regulation. However, due to the number of factors influencing the court's decision to interpret the Dennis by-law as non-zoning, the limits of the holding are not clear. In particular, it is debatable whether the court would have reached the same decision had Dennis had a history of wetlands zoning prior to enacting the disputed by-law.

The *Lovequist* court had little trouble distinguishing the wetlands by-law in *Lovequist* from the invalid trailer park by-law in the *Rayco* case because the town in *Rayco* had a pre-existing by-law which regulated trailer parks "in a comprehensive fashion."<sup>149</sup> Thus, under the *Lovequist* decision, a Massachusetts municipality could presumably pass a home rule by-law or ordinance regulating wetlands development provided that any pre-existing zoning enactments regulating wetlands were not found to treat the subject "comprehensively." Precisely how detailed the pre-existing zoning regulation can be before it will be adjudged "comprehensive" is a question which only future cases can decide. It is, however, a question of more than academic concern. Numerous Massachusetts municipalities have passed zoning by-laws and ordinances regulating construction on flood plains.<sup>150</sup> Although flood plain zoning enactments seek to protect different interests than those by-laws and ordinances regulating wetlands development, the two areas of regulation clearly overlap. Whether a town which had engaged in flood plain zoning could enact a home rule wetlands by-law without that by-law's being interpreted as an invalid amendment to the existing zoning regulations is a significant question which remains to be answered.

Due to the existence of such unanswered questions, home rule wetlands regulation must be approached with caution. The *Lovequist* decision is not a panacea for municipalities beleaguered by the complexities of zoning. Strictly read, it authorizes the use of home rule powers only in limited fact situations. While the holding in *Lovequist* may be broadened in future cases, municipalities considering employing the home rule approach embodied in the Dennis wetlands by-law should first be certain that this approach is

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<sup>148</sup> *Id.* at 2218, 393 N.E.2d at 863.

<sup>149</sup> *Id.*

<sup>150</sup> See Dawson, *Protecting Massachusetts Wetlands*, 12 SUFFOLK L. REV. 755 (1978). See generally, Dunham *Flood Control Via the Police Power*, 107 U. PA. L. REV. 1098 (1959).

appropriate given the regulatory needs and history of the individual town or city.

It is likely that real estate interests in Massachusetts will criticize the *Lovequist* decision for upholding an arguably confusing system of municipal permit requirements apart from the Wetlands Protection and Zoning Acts. This criticism cannot withstand close scrutiny. It should be remembered that had the Supreme Judicial Court found the Dennis by-law invalid, municipalities could still regulate the development of wetlands under the authorization of the Zoning Act. Thus, at least to the extent that home rule enactments are used as an alternative to zoning by-laws and ordinances, the total number of permits required will not be increased under *Lovequist*. Furthermore, the substantive provisions of zoning by-laws and ordinances would be no less varied than those of home rule enactments. Finally, given the procedural complexities of the Zoning Act,<sup>151</sup> it is difficult to argue that the certiorari appeal from the home rule by-law in *Lovequist* is, in itself, any more complicated than an appeal under the Zoning Act.

The real heart of any concern about the *Lovequist* decision lies in the fact that by limiting review of local decisions it places more authority in the hands of municipalities than was formerly available under either the Wetlands Protection Act or the Zoning Enabling Act. The answer to this distrust of local power can only be that the *Lovequist* opinion follows a policy decision made when Massachusetts adopted its home rule amendment. Article 89 grants a constitutional presumption of validity to municipal enactments.<sup>152</sup> If local authority is abused, or if its exercise, in the opinion of the state legislature, conflicts with state legislation or policy, it is well within the power of the legislature to pre-empt expressly the field of legislation from local action.

Given this construction of home rule in Massachusetts, the result in *Lovequist* cannot be faulted. If the legislature deems the Dennis wetlands by-law confusing or unwise, it can pre-empt the field and prevent any further municipal experimentation in wetlands regulation. Therefore, there is no need for the judiciary to terminate such experimentation by finding it inconsistent with state legislative policy unless the inconsistency is very clear. The fact that the Massachusetts Supreme Judicial Court followed this

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<sup>151</sup> See text and notes at notes 51-58 *supra*.

<sup>152</sup> See text at notes 68-74 *supra*.

policy of judicial restraint when it declined to invalidate the Dennis home rule wetlands by-law is perhaps the most important aspect of the *Lovequist* decision.

The *Lovequist* decision is obviously one reached under Massachusetts constitutional and statutory law. Its primary significance is within that state. However, especially in states without the extensive wetlands legislation found in Massachusetts, a home rule approach similar to that found in *Lovequist* could be of great importance to municipal wetlands protection both substantively and procedurally. Under home rule a municipality could conceivably supply the wetlands regulation absent at the state level. The feasibility of such an approach will of course depend on the form of home rule a state employs and its judicial interpretation within that state. Yet, the *Lovequist* decision should stand as persuasive authority from a leading state that a liberal approach to home rule environmental protection can be taken without jeopardizing a state's authority or its legislation. The recognition of that fact would enhance environmental protection throughout the country.

#### V. CONCLUSION

Massachusetts municipalities have substantial statutory authority to regulate the development of local wetlands. This authority exists under the Massachusetts Wetlands Protection Act, the Zoning Act, and the state earth removal statute. However, each of these authorizations has drawbacks. Under the Wetlands Protection Act the state retains considerable control over local wetlands regulation. The Zoning Act is procedurally demanding, and the earth removal statute is substantively narrow. Because of these drawbacks, municipalities have turned to wetlands regulation under their home rule powers.

In *Lovequist v. Conservation Commission of the Town of Dennis*, the Supreme Judicial Court upheld the validity of municipal wetlands protection under home rule powers. It decided that a home rule wetlands by-law enacted by the town of Dennis was neither inconsistent with the Wetlands Protection Act nor with the Zoning Enabling Act and was, therefore, not precluded by state law. Although the exact scope of this decision is not yet certain, the *Lovequist* decision has opened an important new path for wetlands protection at the municipal level.